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NO. 89-151

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

THE STATE OF IDAHO,

Petitioner,

-vs-

JAIMI DEAN CHARBONERU,

Respondent,

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IDAHO

BRIEF OF THE STATES OF ARIZONA, INDIANA, MISSISSIPPI, MONTANA, AND NEBRASKA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. When the sentencing is to be conducted by a judge rather than a jury, and when there is present evidence that is not relevant pursuant to Booth v. Maryland, but the trial court has stated that it has endeavored to avoid anything that might be hearsay, not pertinent, or not supported by the evidence, is the presence of this evidence at the sentencing a denial of due process and does it result in a sentencing proceeding that violates the Eighth Amendment's prohibition against cruel and unusual punishment.

2. Does the Sixth Amendment prohibit the use of hearsay evidence at the sentencing phase, and if so, is the admission of hearsay evidence subject to harmless error analysis.

3. Does the Eighth Amendment require that the sentencing authority balance all of the mitigating circumstances against each one of the aggravating circumstances.

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INTEREST OF AMICI CURIAE

The States of Arizona, Montana, and Nebraska, like the State of Idaho, provide in a capital case that the trial court shall make the factual finding whether aggravating and mitigating circumstances exist, and shall then weigh the aggravating and mitigating circumstances and determine the appropriate sentence; the jurors are therefore not involved at all in the sentencing process. The State of Indiana provides for the jurors to give an advisory verdict, but the trial court ultimately determines the sentence. Accordingly, these states have an interest in the first issue presented in the petition for writ of certiorari, since it affects all of the states that have sentencing done by the trial court rather than the jurors.

The States of Arizona, Mississippi, Montana, and Nebraska provide that any information relevant to mitigation may be presented by either the prosecution or the defense, without regard to the rules governing admissibility of evidence at the trial. Accordingly, these states have an interest in the second issue presented in the petition for writ of certiorari, since it affects all of the states that allow the introduction of hearsay evidence.

The States of Arizona, Indiana, Mississippi, Montana, and Nebraska provide that the sentencing authority shall weigh all of the aggravating circumstances against all of the mitigating circumstances, and then determine the proper sentence. Accordingly, these states have an interest in the third issue presented in the petition for writ of certiorari,

since it affects all of the states that require the sentencing authority to balance the aggravating circumstances against the mitigating circumstances.

SUMMARY OF ARGUMENTS

There is a presumption that a trial court, in making a determination, will consider only admissible evidence. Thus, when the information at a capital sentencing contains both admissible and inadmissible evidence, the presumption exists that the trial court considered only admissible evidence. In the present case, because the trial court stated that it had endeavored to avoid anything that might be hearsay, not pertinent, or not supported by the evidence, the presence of this information did not result in a denial of due process and did not result in a sentencing proceeding that violated the Eighth Amendment's prohibition against cruel and unusual punishment.

This Court has held that the sentencing authority should be aware of all relevant facts when imposing sentence, therefore either party should be allowed to introduce reliable hearsay evidence. Assuming that hearsay evidence is inadmissible at the sentencing phase, the introduction on any hearsay evidence should be subject to a harmless error analysis.

This Court has never held that a formula is required in weighing aggravating circumstances against mitigating circumstances. The Idaho Supreme Court's decision that the trial court must weigh all the mitigating circumstances together against each individual aggravating circumstance is improper.

ARGUMENTS

I

BECAUSE A TRIAL JUDGE IS IN A DIFFERENT POSITION, BY VIRTUE OF TRAINING AND EXPERIENCE, THAN ARE JURORS, THE PRESENCE OF IRRELEVANT EVIDENCE, WHEN THE TRIAL JUDGE DOES NOT CONSIDER THAT EVIDENCE IN IMPOSING SENTENCE, DOES NOT MAKE THE SENTENCE CRUEL AND UNUSUAL PUNISHMENT AND DOES NOT VIOLATE DUE PROCESS.

In Booth v. Maryland, 482 U.S. 496 (1987), this Court held that the introduction of a victim impact statement at the sentencing phase of a capital murder trial violates the Eighth Amendment for the reason that information about the victim that is unknown to the defendant, and opinions by the victim's relatives about the proper sentence to be imposed, is irrelevant to the sentencing process, thus its admission creates a constitutionally unacceptable risk that the jurors may impose a sentence of death in an arbitrary and capricious manner.

482 U.S. at 502-09. The first question presented in this petition for writ of certiorari is whether and to what extent this reasoning applies to a capital sentencing procedure where the trial court, rather than the jurors, makes the sentencing decision.

This Court has been concerned with the problems inherent when the jurors receive inadmissible evidence and are told to ignore it. In Jackson v. Denno, 378 U.S. 368 (1964), this Court condemned the practice of having the jurors both hear a confession and determine whether it is voluntary, and then instructing them to disregard the confession if they determine that it was involuntary. 378 U.S. at 377. The reason for this is the danger that the jurors, even after finding a confession involuntary, may not be able to disregard it in reaching their verdict. 378 U.S. at 388. This Court

has not, however, expressed that same fear with respect to the trial court. When a defendant moves to suppress physical evidence or a confession, the trial court must hold a hearing to determine the admissibility of the evidence. Jackson v. Denno, 378 U.S. at 376-77. Often at such a hearing, the trial court hears evidence showing that the defendant is guilty of the charges; this does not, however, preclude the trial court from presiding at the trial and indulging in the presumption of innocence when making various rulings that affect the outcome of the case. This is based on the presumption that the trial court will consider only admissible evidence in reaching a determination. This Court has further recognized that there is a difference between judge sentencing and jury sentencing, observing that "it would appear that judicial

sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and is therefore better able to impose sentences similar to those imposed in analogous cases." Proffit v. Florida, 428 U.S. 242, 252 (1976). This Court therefore seems to have accepted the presumption that a trial court will disregard inadmissible evidence in making a required determination.

In the present case, the trial court received a letter from the victim's father giving information about the victim and giving an opinion about the proper sentence to be imposed. The trial court, however, took no account of the letter in its sentencing findings. Even though the trial court stated that it had endeavored to avoid anything that might

be hearsay, not pertinent, or not supported by the evidence, the Idaho Supreme Court set aside the sentence, apparently concluding that the presence of such information was a per se violation of the defendant's rights. State v. Charboneau, ___ Idaho ___, ___, 774 P.2d 299, 319 (1989). Certainly, if the trial court had relied upon such information in sentencing the defendant, the sentencing procedure would have been a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. In this case, however, because the trial court did not rely upon this information and stated that it had disregarded the information, the question is whether presence of this information before the trial court "so infected the entire proceedings with unfairness as to render the resulting sentence a denial of due process." South Carolina v.

Gathers, ___ U.S. ___, ___, 109 S. Ct. 2207, 2216, 104 L. Ed. 2d 876, 890 (1989) (O'Connor, J., dissenting). For the reason that there should be no presumption that the trial court was either mistaken or untruthful when it stated that it had not considered the information from the victim's family, Amici Curiae urge this Court to grant certiorari and hold that the presence of this information did not result in a denial of due process and did not result in a sentencing proceeding that violated the Eighth Amendment's prohibition against cruel and unusual punishment.

Amici Curiae are concerned by this issue because their sentencing procedures are similar to that of Idaho. For example, in Arizona, like Idaho, the trial court makes the sentencing determinations, and may consider in aggravation only those factors listed in

the statute. Arizona Revised Statutes Annotated § 13-703(F). In Arizona, like Idaho, the victim of a felony or the family of a victim who has died has the right to appear at sentencing and give their views; however, unlike Idaho, this provision only applies in non-capital cases. Arizona Revised Statutes Annotated § 13-702(F) & (G). Thus, when the trial court sentences a defendant for both a capital offense and a noncapital offense, the trial court often will have victim impact evidence presented to it. The Arizona courts, however, indulge in the presumption that the trial court, in making the sentencing determination in a capital case, will consider only that evidence that is relevant and admissible at the sentencing proceeding. State v. Beaty, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988), cert. denied, ___ U.S. ___,

109 S. Ct. 3200, ___ L. Ed. 2d ___ (1989). Amici Curiae therefore urge this Court to grant the petition for writ of certiorari and determine whether it is constitutionally permissible, in a capital sentencing, to accept the presumption that a trial court will not consider evidence that is irrelevant and inadmissible under Booth v. Maryland, or whether the presence of such evidence is error per se, as the Idaho Supreme Court has held.

II

THE SIXTH AMENDMENT DOES NOT PRECLUDE THE INTRODUCTION OF HEARSAY EVIDENCE AT THE SENTENCING PHASE OF A CAPITAL CASE, AND IF THE SIXTH AMENDMENT DOES PRECLUDE THIS TYPE OF EVIDENCE, ADMISSION OF SUCH EVIDENCE IS SUBJECT TO A HARMLESS ERROR ANALYSIS.

In Green v. Georgia, 442 U.S. 95 (1979), this Court vacated the sentence of death because the trial court had precluded the defendant from introducing

hearsay evidence that potentially mitigated the sentence to be imposed. The second question presented is whether the Sixth Amendment applies to the sentencing phase of a capital offense, and if it does, whether the introduction of such evidence is subject to a harmless error analysis.

This Court has previously stated that the sentencing authority should be aware of all the relevant facts when imposing sentence. E.g., Lockett v. Ohio, 438 U.S. 586 (1978); Tison v. Arizona, 481 U.S. 137 (1987). In Williams v. New York, 337 U.S. 241 (1949), this Court held that the introduction of hearsay evidence at the sentencing phase of a capital case did not violate due process. This Court has yet to determine whether the introduction of hearsay evidence at the sentencing phase violates

the Sixth Amendment. This Court has held that, although the sentencing phase is similar to the trial phase in some respects, it is not identical. Compare Bullington v. Missouri, 451 U.S. 430 (1981), with Poland v. Arizona, 476 U.S. 147 (1986). Amici Curiae therefore request that this Court grant the petition for writ of certiorari, and hold that such evidence is admissible at the sentencing phase.

Further, this Court has held that a violation of the right of confrontation at the trial stage is subject to a harmless error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). The Idaho Supreme Court refused to apply a harmless error analysis to the introduction of such evidence, and thus in effect held that the introduction of a letter from the victim's father was error

per se. 774 P.2d at 319. It would appear from this Court's reasoning in Van Arsdall that a harmless error analysis would apply with the same force to the sentencing phase as it does to the trial phase. Amici Curiae therefore request that this Court grant the petition for writ of certiorari and hold that a harmless error applies to the sentencing phase.

III

FEDERAL LAW DOES NOT MANDATE THE HIGHLY STRUCTURED BALANCING TEST REQUIRED BY THE IDAHO SUPREME COURT.

This Court has yet to require that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, and has yet to impose any system of weighing on the state courts. See Harris v. Pulley, 692 F.2d 1189, 1195 (9th Cir. 1982), vacated on other grounds, 465 U.S. 37 (1984). The

Idaho Supreme Court held that the trial court erred in failing to weigh all of the mitigating circumstances against each individual aggravating circumstance in determining the sentence. 774 P.2d 324. Because there is no support in any of this Court's decisions for such a requirement, Amici Curiae request that this Court grant the petition for writ of certiorari and hold that the United States Constitution imposes no such requirement.

CONCLUSION

Because the trial court stated that it had endeavored to avoid anything that might be hearsay, not pertinent, or not supported by the evidence, the presence of inadmissible evidence at the sentencing did not result in a denial of due process and did not violate the Eighth Amendment's prohibition against

cruel and unusual punishment. Further, the introduction of the letter from the victim's father was admissible, and if not, was subject to a harmless error analysis. Finally, the Idaho Supreme Court erred when it held that the trial court must weigh all the mitigating circumstances together against each individual aggravating circumstances. This court should therefore grant the petition for writ of certiorari and reverse the decision of the Idaho Supreme Court.

Respectfully submitted,
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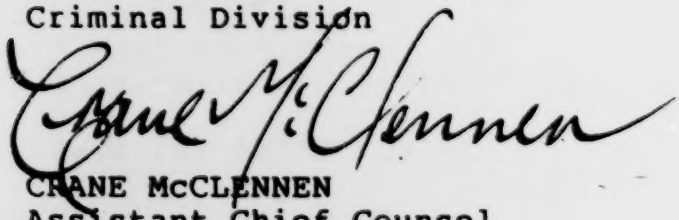

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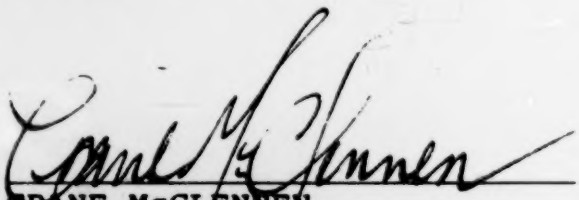

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